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92-408

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

**PAULINE MENARD,**
Petitioner,

versus

**CITY OF BREAUX BRIDGE, ET AL,**
Respondents

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS FOR REVIEW

1. Did the firing of Pauline Menard, for reporting child pornography by fellow police officers to the district attorney's office, while on probation for an unrelated matter and without first notifying her superiors, violate her first amendment constitutional right to free speech as further protected under 42 USC 1983?

2. Did the District Court err in finding that the Defendant's unwarranted actions in dismissing Pauline Menard were not in bad faith?

## NAMES OF ALL PARTIES

1. **Pauline Menard**, Plaintiff
2. **City of Breaux Bridge**, Defendant
3. **Louis Kern, Mayor of Breaux Bridge**, Defendant
4. **George Menard, Police Chief of the City of Breaux Bridge**, Defendant
5. **Wilbert Alexander, Alderman, City of Breaux Bridge**, Defendant
6. **Anthony Hebert, Alderman, City of Breaux Bridge**, Defendant
7. **Vernon Blanchard, Alderman, City of Breaux Bridge**, Defendant
8. **Neil Melancon, Alderman, City of Breaux Bridge**, Defendant
9. **James Hebert, Alderman, City of Breaux Bridge**, Defendant

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## OPINIONS BELOW

There are no reported opinions in this case. The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Attachment A. The opinion of the United States District Court for the Western District of Louisiana is attached hereto as Attachment B.

I.

## GROUNDS FOR JURISDICTION

On June 3, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court (Western District of Louisiana) decision.

The Supreme Court of the United States has jurisdiction to review the Judgment in question under 28 USC 1254.

II

## CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **First Amendment to the Constitution of the United States.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. **42 USC SECTION 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

In February of 1989, Pauline Menard was employed with the Breaux Bridge Police Department as a dispatcher. She had maintained this employment for a continuous period of eight years. During this time her performance was satisfactory with the exception of one two-week suspension for a matter unrelated to her reporting of child pornography.

One evening in February 1989, Mrs. Menard was working her usual shift, when fellow officer Howard Devillier showed her photographs he had found in the desk of police detective Roger Istre. The photographs were of two black female juveniles posing with their breasts exposed. At the time, Mrs. Menard was shocked and did not know who to notify. She did not know whom she could trust in the department, and felt that she could not go to Police Chief George Menard (no relation to Petitioner) because she

believed he always showed favoritism towards Istre and could possibly be involved. She could not go to Assistant Chief Charlie Thibodeaux because his office was in the same room as detective Istre, and she feared he may also have been involved. She feared that this pornography and possible child molesting was ongoing, and did not know the extent. She felt she must do something. She talked the situation over with her husband, Eldridge Menard, and then decided to report it to proper authorities after first meeting with a good and trusted friend, civic leader Palmer Johnson. He suggested they notify the FBI. The Menards then met with Steve Champagne, an employee of the District Attorney office, and an investigation was begun which resulted in the arrest of Roger Istre.

Several other officers knew of the photographs and none reported the matter

to Chief Menard. These three other officers were suspended, but Mrs. Menard was the only one who was fired, specifically on Chief Menard's recommendation that she be terminated. Based on this recommendation, the City Council terminated her employment. Chief Menard cited as reasons for the recommendation the fact that she was on probation at the time for an unrelated matter, that she had not informed her superiors, and that she had released information to "outsiders" not on the police force.

Defendants contend that she did not follow the proper chain of command and reported the matter to "outsiders." This decision to terminate her was made because Mrs. Menard exercised her 1st amendment right to freedom of speech, and so she filed suit under 42 U.S.C. 1983 against the City of Breaux Bridge, et al for

violation of her civil rights. The federal District Court heard the case on August 20, 1991, and rendered judgment in favor of Defendants, finding that Mrs. Menard, who acted in good faith, should not have been discharged for failure to follow the chain of command, but that the termination of her employment did not merit the protection of Section 1983, and no constitutional right to speech was violated by the defendants' actions. Petitioner Menard brought an appeal to the 5th Circuit Court of Appeals, which affirmed the District Court, and now asks this Honorable Court for review of the improper judgment.

## ARGUMENT RE: ISSUE I.

1. **Did the firing of Pauline Menard, for reporting child pornography by fellow police officers to the district attorney's office, while on probation for an unrelated matter and without first notifying her superiors, violate her first amendment constitutional right to free speech as further protected under 42 USC 1983?**

Pauline Menard was terminated from her job as a police dispatcher for telling her husband and the District Attorney's office of two photographs taken by a fellow police officer of female juveniles exposing their breasts. Upon this notice, an investigation was performed by the District Attorney and Sheriff's offices, which resulted in the arrest of Breaux Bridge police officer Roger Istre. It is undisputed that the only notification to these offices came through Pauline Menard, even though Defendants claim other officers were investigating. Pauline Menard was subsequently fired on recommendation of Police Chief Menard.

Reasons given were her telling of these photographs to "outsiders," in violation of an unrecorded chain of command, and being on probation for an unrelated matter.

Defendants contend that she was discharged partially because she was on probation for an unrelated matter. Pauline Menard had apparently been placed on probation for not passing on information to an officer on call. Defendants attempt to hide their violation of her constitutional right to reveal corruption by arguing that the fact of probation is relevant. As to whether her free speech was violated, this fact is irrelevant. One cannot be terminated for exercising constitutionally protected speech. Had she not spoken to the District Attorney, she would not have been fired. Defendants' actions are in clear violation of constitutional law.

The District Court found that Pauline Menard should not have been terminated. The District Court also found that Pauline Menard reported the incident to a law enforcement officer, that being the district attorney, and that Pauline Menard acted in good faith. These finding of fact were not erroneous and should not be disturbed.

What was erroneous was that, despite its findings above, the court still concluded that Pauline Menard's speech did not "merit(s) the protection of Section 1983, which requires that a constitutional right be involved." Pauline Menard's termination resulted directly because of her exercise of free speech in revealing the internal corruption. Clearly, a constitutional right is involved.

The controlling law for determining whether a person was improperly and unconstitutionally discharged for

exercising free speech is clearly established in the constitutional law. A public employee can not be discharged for exercising his or her protected right to free speech under the first amendment of the U. S. Constitution. Pickering v. Board of Ed. of Tp. H.S. Dist. 205, ILL., 88 S.CT. 1731 (1968); Rankin v. McPherson, 483 U.S. 378, at 383 (1987); Connick v. Meyers, supra, at 1687 (1983). Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990); Price v. Brittain, 874 F.2d 252, 256 (5th Cir. 1989); Page v. Delaune, 837 F.2d 233, 237 (5th Cir. 1988). This right is limited, and a balancing of interests is necessary to determine if the right was violated. The proper balancing test was established in Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., supra. That the test be carefully applied is essential, and it is not to be pushed aside so as to allow a

court to decide haphazardly. This Supreme Court has said that this balancing "is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." Rankin v. McPherson, 107 S.Ct. 2891 (1987) at 2897.

The correct analysis consists of several steps: the speech must involve a public concern, the employee's interest must be balanced against and outweigh that of the defendants, and the protected speech must have been a substantial factor in her discharge. The 5th Circuit explained this analysis in Thompson v. City of Starkville, Miss., supra, at 460:

> Case law, in this circuit, considering the question of whether particular speech by a public employee is protected has applied the following analysis: In order to establish a constitutional violation [the plaintiff] must first prove that her speech involved a matter of public concern. Connick v.

> Meyers, 103 S.Ct. at 1684, ...(1983). Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the efficiency of the public services [they] perform". Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., 391 U.S. 563,...(1968). Third, she must show that her speech motivated the defendants' decision to fire her. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274,...(1977).

In the present matter, the District Court did not apply this test in any more than a cursory manner. Properly applied, the only reasonable conclusion to be reached is that the firing of Mrs. Menard for reporting the photographs to her husband and the District Attorney and not to her superiors was clearly in violation of her constitutional right to exercise free speech. The following analysis of the facts as determined at trial to the proper law will verify this conclusion.

Matter of Public Concern

The exercise of free speech by Mrs. Menard consisted in her telling her husband Eldridge Menard, civic leader Palmer Johnson, and the District Attorney of the discovery of photographs of nude children that were in the desk of a fellow police officer. To be protected, Mrs. Menard's speech must be "fairly characterized as constituting speech on a matter of public concern." Connick v. Meyers, supra, at 1689. "Whether an employee's speech addresses a matter of public concern must be determined in the content, form, and context of a given statement, as revealed by the whole record." Connick, supra, at 1690. Although Defendants contested whether the speech was of public concern in their Court of Appeals Appellee Brief, they conceded that it was a matter of public concern during oral arguments before the 5th Circuit Court of Appeals.

The content of Mrs. Menard's speech was evidence of child pornography and possible child molesting. This is a valid public concern. Mrs. Menard's concern was that child molesting was occurring and had to be stopped. She testified that "I have kids. Everybody in here have [sic] kids, and he maybe would have kept on doing the same thing and got more kids involved." (trans. vol.3 p. 83). The public has a true concern for the safety of its children, especially from sexual exploitation. This content did not involve matters solely concerning internal employment policy, but rather involved a matter of true public concern. Mrs. Menard spoke as a citizen concerned about the welfare of the children in the community, and not as an employee dissatisfied with management.

The matter involved a police officer taking photographs of nude children,

evidencing clear impropriety in the police department. As such, the constitutional jurisprudence grants this speech constitutional protection. This case is similar to Thompson v. City of Starkville, Miss., supra, which concerned a discharge of a police officer allegedly for written grievances and oral complaints he made concerning egregious misconduct by certain fellow police officers. In upholding a denial of the defendants motion for summary judgment, the 5th Circuit Court of Appeals held that a higher protection is to be granted when the speech involves police misconduct, at 463:

> this court has held, albeit under different facts, that where speech "complained of misconduct within the police department, it should be classified as speech addressing a matter of public concern." If released to the public, Thompson's affidavit would expose possible corruption in the police force of the City. (quoting Brawner v. City of Richardson, Tex., 855 F.2d 187 at 192. (5th Cir. 1988).

Brawner involved a police officer who had his attorney send a letter to the city leaders and local papers requesting an investigation concerning incidents of the police department keeping noncriminal files on citizens and reporters, as well as allegations of drug use by officers which were covered up by the department. In upholding the district courts denial of the defendants' summary judgment motion, the 5th Circuit in Brawner stated, at 192:

> The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of the police department.

The court in Thompson v. City of Starkville, Miss., supra, at 463, also quoted the 10th Circuit case of Conaway v. Smith, 853 F.2d 789 (1988), stating "speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials,

in terms of content, clearly concerns matters of public import." Certainly the court should have found the speech concerning child pornography and potential child molestation to be of public concern, even without the higher protection the 5th Circuit gives to speech concerning police misconduct.

This court addressed the applicable law in Connick v. Meyers, supra, where District Attorney Harry Connick fired an assistant district attorney for what he termed insubordination. The contested speech was a questionnaire circulated by Sheila Meyers to her fellow employees. Meyers had been upset because of an unwanted transfer and a prior heated exchange with Connick concerning the transfer order. The Court considered the form and context of the speech as well as the content in determining whether the speech involved a public concern. They

found the questionnaire did not serve any other purpose than to "gather ammunition for another round of controversy with her superiors." Connick, supra, at 1691. The questionnaire was written immediately by Meyers following her argument with her supervisors. Meyers testified that the timing was not accidental.

In contrast, Mrs. Menard's speech was in the form of discrete disclosure in an effort to seek help in stopping a public threat. The context involved a time when she feared reporting to her superiors would not end the public threat as she did not know which officers may have been involved. (trans. vol.3 p. 82, 83). All of the factors Connick required for speech to be public are met in the issue now before this Honorable Court. In deciding that all but one of the questions were not of public concern, this court in Connick went on to state that Meyers did not "seek

to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." Mrs. Menard did bring to light to the proper authorities wrongdoing in the police department; child pornography and possible child molesting. She caused an investigation which resulted within three days in the arrest of the offender. This stopped potential and actual wrongdoing which clearly endangered the well-being of the town children.

Balance of Interests

Once we establish that the speech is of public concern, we perform a balancing of both parties interests. Determining whether or not an employee's right to free speech has been violated requires a balancing of the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in

promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., supra. Although the court properly found this standard, it did not actually balance the conflicting interests of both parties. A balancing of the evidence of the interests of Mrs. Menard and the police department presented at trial clearly weighs in favor of Mrs. Menard.

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. Rankin v. McPherson, supra, at 2899. Therefore the District Court should have considered the situation surrounding Mrs. Menard's disclosure to her husband, civic leader Mr. Johnson, and the district attorney's office instead of to her

superiors. Mrs. Menard reasonably believed that nothing would be done towards a potential child molester, and that anyone in the department could have been involved because the photos were found in the office shared by the Assistant Chief of Police and the offender Istre. (trans. vol.3 p.82). Mrs. Menard believed that Chief Menard would not do anything, "because several incidents happened in the police department where he didn't do anything about it." (trans. vol.3 p.83). She believed that Istre would not be exposed by the Chief because Istre had been rehired at the recommendation of the Chief of Police despite his prior dismissal for rumored impropriety in kicking a black woman in her buttocks. (trans. vol.3 p.25) (Chief Menard said he could not recall the reason for the first dismissal of Istre.) The situation was unstable and Mrs. Menard did

not know whom she could trust to stop the danger to the children in the community, so she sought out the advice of those she trusted most and decided to go to the proper authorities.

In considering the context of what occurred, the court must take note that the incident was reported to the proper law enforcement department by Mrs. Menard and her husband, and led directly to the arrest of Istre within three days. The District Court did find that Mrs. Menard informed the D.A. In all likelihood, notifying the Police Chief would have permitted a much longer period of time to stop this child pornography and possible child molesting, and the dangerous situation would not have been alleviated as soon. The District Attorney's office immediately notified the Sheriff's office, which conducted the actual investigation. As acknowledged by Chief Menard, the

police department had no internal affairs division. Also critical to Mrs. Menard's choice of action was the fact that there is no written policy or procedure for reporting evidence of police or departmental misconduct in the Breaux Bridge Police Department handbook. (trans. vol.3 p.20; trans. vol.3 pg.68; trans. vol.3 pg.92). Nor is the defense claim of "common sense" realistic, much less binding, as defendants would have Mrs. Menard notify no one, including the District Attorney, of this issue so crucial to public welfare.

The very fact that the content was of such serious public concern weighs heavily towards Mrs. Menard's interest in the balancing test. The 5th Circuit in Price v. Brittain, 874 F.2d 252 (5th Cir. 1989), at 258, reiterated this by stating that "in assessing the weight to be accorded to the plaintiff's free speech interests we

also consider the extent to which that speech implicates matters of public concern."

In weighing the interests of the police department in promoting its efficiency, the 5th Circuit has said that three aspects of the speech must be considered: 1) whether the speech was likely to generate controversy and disruption, 2) whether the speech impeded the department's general performance and operation, and 3) whether the speech affected working relationships necessary to the departments proper functioning. Brawner v. City of Richardson, Tex., supra. The defendants did not introduce any evidence of disruption of the general performance and operation of the police department. They did not show any evidence of damage to the Sheriff's investigation of Istre, and in fact Istre was arrested within three days of Mrs.

Menard's disclosure. The only contention made by defendants was a statement by police Chief Menard that "everyone on the street knew" of the incident. (trans. vol.3 p.27). The evidence indicates this to be untrue, as every witness following the Chief testified that they heard no rumors or talk from anyone on the street concerning the incident. (trans. vol.3 p.57, and vol.4 p.42, 46). Chief Menard did not in any way indicate that knowledge by outsiders damaged the Sheriff's investigation, but rather simply expressed disappointment that he was not informed. (trans. vol.3 p.26).

The defendants also contend that, although it did not in this case, outside knowledge may have injured an investigation and prosecution. This similar argument was made by the defendants in Brawner v. City of Richardson, Tex., supra. Those defendants

contended that they maintained an interest in an internal investigation. Their argument was supported by the fact that the Richardson police department maintained an internal investigation department, unlike the Breaux Bridge Police Department in the present matter. Any investigation in the Breaux Bridge Police Department would have been conducted by an outside office, the Sheriff, with or without Mrs. Menard's disclosure. The court in Brawner defeated this argument because the content of the speech was police misconduct, which is virtually always considered public content. The court stated that "even assuming that the department maintained an interest in a confidential internal investigation, such an interest would be outweighed by the public's interest in the disclosure of misconduct or malfeasance." Brawner, supra, at 192. The same

reasoning should apply to the present situation. The public's interest in stopping any child molesting and pornography occurring in the police department outweighs any interest Breaux Bridge maintains in a confidential internal investigation. Further the only effect of the disclosure was an extremely positive one, the arrest of Istre. The statement could not have affected the proper functioning of the department, because the statement involved was made for the very reason that the police department was not operating properly; corruption in the department existed and there was no way to know who was involved.

The defendants contend that the police department has a strong interest in maintaining loyalty and cite Connick v. Meyers, supra, for the proposition that the government must have wide discretion and control over the management of its

personnel and internal affairs. However, in discussing this, Connick, also stated that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." Connick, supra, at 1693. The speech in Connick was a questionnaire with only one sentence indicating any public concern; possible pressure on the employees to assist in political campaigns. In contrast all of Mrs. Menard's speech involved public concern over serious danger to children. Clearly the stronger showing mentioned in Connick is necessary to defeat the speech interest of Mrs. Menard. The speech by the Connick plaintiff was found to be disruptive and tended to create serious problems in the relationship between the district attorney and his assistant district attorneys. If the Connick plaintiff had not been fired, the rift she created would remain and the

efficiency of the department would definitely have been affected. This is not the case in the Breaux Bridge department. The actions of Mrs. Menard were in no way disruptive to the department. The speech was communicated to someone outside the department so the relationships between the employer and employees was not affected. As to her relationship with all other fellow officers, Petitioner would show this court that there were 14 or 15 officers employed by the Breaux Bridge Police Department at that time. (trans. vol.3 pg.10). City Attorney Mike Harris' report, discussed below, lists at least five different officers involved in sexual improprieties with juveniles. This is at least one third of the relationships Pauline Menard "affected" by her disclosure. Clearly, these are not working relationships with which she should have been concerned. Had

Mrs. Menard been able to maintain her job, no disruption would have resulted from her speech.

Petitioner agrees that the police department had an interest in developing efficiency, loyalty, and trust. However, in no way will Petitioner concede that loyalty, efficiency, and trust should be granted to protect fellow officers from criminal charges for child molestation and to allow continuance of such heinous deeds. The Breaux Bridge Police Department does have an interest in instilling public confidence in the institution, but Plaintiff is under no obligation or justification to help seduce the public into a false confidence by hiding evidence of child molestation and child pornography committed by officers sworn to protect the public.

Petitioner agrees that the state has an interest, as stated by Defendants, in

"a high degree of trust and loyalty among the officers and their supervisors" and that "confidentiality is a necessary ingredient for a stable, efficient police department." This, however, does not apply to a cover-up. Pauline Menard's interests in protecting her children by exposing any corruption and child molestation that she is aware of clearly outrides any duty to be "loyal" and maintain "confidentiality" which would only serve to cover up the police action, and alert any potential wrongdoer so that he may destroy evidence.

The environment in the police department as to which defendants would have preferred that Pauline Menard keep her mouth shut was one of corrupt and rampant policy impropriety and must be considered. Attorney Mike Harris' report, entered at trial as Plaintiff's Exhibit P-10 and further entered into this appeal as

Defendants' Supplemental Record Excerpt D-3, paints the picture clearly of the environment in which Pauline Menard worked. Besides pornographic photos of children in police officers' desks, the report states that there were rampant episodes and reports of child molestation, sexual impropriety, child sexual abuse, statutory rape, and homosexual relationships with juveniles. All of these claims involved officers of the police force to whom Pauline Menard is supposed to support, trust, and establish close working relationships with:

> "From another source in the S.O., I learned that Goodie and Derouselle were directly in one incident where one juvenile was held down and partially stripped while a picture was taken.
>
> I have also been advised that Ezebe [Chevallier] and Howard [Devillier] are sexually involved with a minor. There is no confirmation as the S.O. states that the girl denies the claim. Apparently there are no independent witnesses. We were also advised that several

> juveniles claim to have been picked up, and [ridden] around with police officers until two or three in the morning..
>
> ***
>
> The Mayor, Chief Charlie and I met with the Sheriff and Butch Dupuy. The above facts were confirmed. . .
>
> ***
>
> Regarding the various juveniles, only one of the incidences is really troublesome, that of the child held down and photographed. The rest appear to be willing participants. There is a claim of a homosexual relationship which may also be a problem; however, the D.A. may not even accept charges here. In any event, the potential exposure to the City may exceed the ability to pay. Appropriate steps may have to be taken to seek protection.
>
> I have also learned that, at least on one occasion, Roger, acting alone, forced two females to disrobe, while they were detained for an offense which would not require a search."

All of these findings were known and written into this report <u>before</u> Pauline Menard was fired by the City Council. Portions of this report were read to the

City Council during the hearing which involved the determination of whether or not Pauline Menard would be fired. (trans. vol.4 pg.74; trans. vol.4 pg.76-77; trans. vol.4 pg.79-80).

The facts of this case are very similar to Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984), where it was argued that the police department maintained a strong interest in the "chain of command" being followed. There a dispatcher was fired for reporting misconduct on the police department to a person outside the departments' "chain of command." Brockell phoned another police department, which would be administering a test to the members of Brockell's police department, and reported a fellow officer's possession of an answer sheet to that test. The Court of Appeals held that his dismissal was not for a valid reason, noting that the outside party was in good position to

make a quick investigation and resolution and plaintiff's speech was a less disruptive method of communication that may have been chosen. Similarly, Mrs. Menard reported the incident to an outside party in position for a quick investigation and resolution - the district attorney. She could certainly have reported the incident to the media, or in some other more disruptive method of communication. The court in Brockell found that the "chain of command" was not written in any manual or handbook generally available to employees. Similar, the handbook of Breaux Bridge does not have any written chain of command or procedure for reporting internal misconduct. (trans. vol.3 p.20). The court in Brockell also found that the plaintiff maintained a legitimate doubt whether reporting the misconduct would resolve the matter because of certain

favoritism shown by the Mayor and/or Chief towards the person committing the malfeasance. Similarly the evidence shown at trial shows that Mrs. Menard had a legitimate belief that following the "chain of command" would not resolve the problem because of the favoritism shown by Chief Menard. In discussing chain of command, the Brockell court stated:

> We cannot simply decide in the abstract, however, that a chain-of-command policy designed to protect this interest will always take precedence over the interest of a public employee in open communication. Rather, we must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy. Brockell, supra, at 667.

The court also stated:

> An employee's first amendment interest is entitled to more weight where he is acting as a whistleblower exposing government corruption. Brockell, supra, at 668.

Upon balancing, it is clear that Mrs. Menard's interest in her protected speech concerning police misconduct involves a public concern and substantially outweighs any interest the police department has in its efficiency. Her speech is entitled to even greater protection because of its police misconduct content, and there was no disruption caused in the police department. Its normal operation was in no way affected, and no relationship between employer and employee was damaged except that of Istre.

This court must consider all the factors surrounding Petitioner's exercise of free speech, and it would be absurd to allow the Defendants' conclusion that the fact that Pauline Menard revealed information of such corrupt and unthinkable acts and breach of public trust in he policy department means she can't be trusted in future Breaux Bridge

routine police investigations. Defendants state that "it is clear that her conduct nevertheless insidiously weakened the functions of the Breaux Bridge Police Department and potentially impedes its future operations." (trans. vol.3 pg.29). However, it appears obvious to Petitioner that the "weakening of the functions of the Breaux Bridge Police Department" are clearly a result of the individual officer's criminal conduct and sexual impropriety with children, and has nothing to do with Pauline Menard's disclosure of these to the District Attorney.

Mrs. Menard simply made a decision concerning how to stop a public threat to children in the community, and acted in the manner she reasonably thought was best to alleviate the danger. We should also look at the ultimate result of her actions: Istre was arrested within three days, the danger to children in the

community was abated, no damage occurred to the investigation, and no hindrance of the police departments normal routines occurred. Nevertheless, Mrs. Menard was terminated for making the proper decision.

Speech as a Substantial Factor in the Termination

The last question to be decided is whether Mrs. Menard's exercise of protected speech was a substantial factor in her termination. The key question is whether the termination was justified. The District Court herein found that the termination was not justified:

> "I don't believe that her dismissal from the force is commensurate with the offense which she allegedly committed, that is to say, as stated, that failure to report it to her immediate superior or the Chief. She did report it to a law enforcement officer. That was the District Attorney...
>
> * * *
>
> ...I don't think Mrs. Menard should have been terminated for that reason. I think she deserved, if anything, the same punishment as [meted] out to the

> other officers who failed to make the disclosure to the Chief....
>
> * * *
>
> ...I don't believe that the case is one that merits the protection of Section 1983, which requires that a constitutional right be involved." (trans. vol.4 p.135-136)

The speech of Mrs. Menard was the sole reason for her discharge. She would not have been terminated otherwise. Section 1983 does afford Mrs. Menard protection from termination for her conduct and actions. The trial court found in favor of Petitioner on the facts and summarily declared that said fact situation did not rise to the level of a Section 1983 protection. The jurisdiction cited by Petitioner above clearly refutes the trial court's interpretation of the law and the facts of this case.

The Chief's recommendation for the termination stated the reasons as follows:

> This action results from your failure to advise your superiors, specifically myself

> and Assistant Chief Thibodeaux of evidence you were aware of pertaining to the possible misconduct of a fellow officer. Further, you have failed to notify the proper legal authorities, in violation of your swor[n] duty to so act. In addition, you provided this information to a civilian outside the police department. These actions are contrary to department policy, and adversely reflects upon your ability to perform your duties as a police officer. (Defendants exhibit D-1, letter of suspension to P. Menard from Chief Menard.)

Her prior probation is irrelevant; they would not have fired her if she had not gone to the District Attorney with her husband. Chief Menard and the city council said that her actions in speaking to someone outside the chain of command was reason enough for her termination. Yet fellow officer Howard Devillier also broke the chain of command; although he notified Sergeant Ezebe Chevallier, he also reported the photographs to a non-law enforcement person, councilman Wilbert Alexander. (trans. vol 3, p.54 and 66).

Neither Devillier nor Chevallier notified the Chief, but "just decided ourselves to conduct an investigation." (trans. vol. 3, p.54). Yet they were not terminated. The same reasoning and dangers argued by defendants towards disclosing information to an outsider and non-law enforcement officer apply here. Surely this is the same offense committed by Mrs. Menard, yet she was terminated while Devillier and Chevallier were not.

City Councilman Alexander testified that he made his decision to terminate Mrs. Menard solely on the letter of recommendation by Chief Menard, and that the council did not investigate the matter. (trans. vol. 4 p.56). Councilman Vernon Blanchard testified that her actions in going to a "civilian" outside the police department was improper and that "there's a lot of scrutiny that should be held in the police department

and that should be kept in the police department. It should not be shared with anybody who is a civilian and not a police officer." (trans. vol.4 p. 67). As to a policy for reporting police misconduct, he stated that "I don't think we have the policy, but common sense tells you you don't go on the street and tell civilians. I think common sense tells you that." He voted to terminate her after assurance from the city attorney Mike Harris that termination was appropriate. (trans. vol.4 p.70- 71). Blanchard stated that he was unaware that she had notified the district attorney indirectly. (trans. vol.4 pg.66).

The evidence presented here clearly shows that Pauline Menard's decision to exercise her right to protected speech in reporting the crime to the District Attorney was clearly a substantial factor in her termination, if not the only one.

The defendants have not shown that the firing of Mrs. Menard was justified, and she has shown that her speech was a substantial factor in her termination. Mrs. Menard has shown that her speech did involve a public concern, and that this concern involved police misconduct and as such is entitled to even higher protection. Plaintiff has shown that her interest as a citizen in disclosing the information of great public concern to the District Attorney outweighs any interest the Breaux Bridge Police Department may maintain in efficiency. Mrs. Menard has shown that her speech was a substantial factor in her unjustified termination. Clearly Mrs. Menard had a constitutionally protected right to speech, and that right was infringed upon by her improper termination in clear violation of 42 U.S.C. sec. 1983. The District Court erred in finding otherwise.

## ARGUMENT RE: ISSUE II.

2. **Did the District Court err in finding that the Defendant's unwarranted actions in dismissing Pauline Menard were not in bad faith?**

The court found that the defendants acted in good faith in everything they did. It found that the plaintiff had not carried her burden of proving that the defendants "collectively or individually or willfully acted in their official capacity to deprive her of her constitutional rights..." (trans. vol.4 p.137). If the court had properly found that a violation of Mrs. Menard's right to free speech had been violated, then this finding of good faith on the part of the defendants would be a finding of a successful qualified immunity defense. This would be improper as well, because the court would not have reached this conclusion had they applied the proper law.

To determine if a defendant has qualified immunity, the U.S. Supreme Court and the 5th Circuit requires that the court "evaluate whether the constitutional right asserted was 'clearly established' at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right." Thompson v. City of Starkville, Miss., supra, at 468, quoting Brawner v. City of Richardson, Tex., supra, at 191. Therefore defendants are not shielded from civil liability if "their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known". Thompson, supra, at 469 quoting Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982). In Thompson, the 5th Circuit discussed whether qualified immunity applied to police officers who had allegedly fired plaintiff as a result of

his complaints of unearned promotions and other grievances. The court restated the inquiry as whether the individual defendants would reasonably have known that their actions would violate [plaintiff's] right to free speech. The court found that at the time of Thompson's speech, it was well settled that public employees could not be fired for exercising their first amendment rights. Thompson's speech occurred in 1981 when he filed grievances. Mrs. Menard's speech occurred in February of 1989. Clearly, the constitutional law protecting free speech known and established in 1981 was also known and established in 1989. The 5th Circuit also faced the issue of qualified immunity in Brawner v. City of Richardson, Tex., supra. The court stated the same standard of reasonableness in violating an established right to free speech and held:

> At the time that [the attorney] wrote on Brawner's behalf and Brawner was discharged, the First Amendment right of an employee to speak out on a matter of public concern was clearly established. It was clearly established that a public employee's speech revealing improper conduct by fellow employees was protected. Thus a reasonably objective public official would have known that termination of an employee for his speech concerning misconduct by public officials would violate a clearly established constitutional right. (Brawner v. City of Richardson, Tex., supra, at 193.)

The letter involved in the case above was written in February, 1985. Mrs. Menard's speech occurred in February, 1989. Once again, a constitutional right clearly known and established in 1985 is also known and established in 1989.

For these reasons, all present defendants should be liable for damages incurred by Mrs. Menard for her unconstitutional termination, and attorneys fees and punitive damages should be granted.

## CONCLUSION

The case was decided improperly by the lower court. A proper analysis and conclusion would result in a finding that Pauline Menard's constitutional right to freedom of speech was violated by defendants and as such she is entitled to recovery of her damages and attorney fees under title 42 U.S.C. 1983. Petitioner-Appellant prays that the Court of Appeal review the statements and record and overturn the decision, granting judgment in favor of Petitioner-Appellant, Pauline Menard.

Respectfully submitted,

ANTHONY J. BRUSCATO
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PAULINE MENARD

CERTIFICATE

I hereby certify that a copy of this Brief was mailed, with attachments, with postage prepaid, to Mr. Chester Cedars, 113 East Bridge Street, Breaux Bridge, Louisiana 70517, counsel for Defendant-Appellee, this 1 day of September, 1992.

ANTHONY J. BRUSCATO
ATTORNEY FOR PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 91-4844

---

PAULINE MENARD,

Plaintiff-Appellant

v.

CITY OF BREAUX BRIDGE, ET AL,

Defendant-Appellees

---

Appeal from the United States District Court for the Western District of Louisiana
(CA-89-2739)

---

Before HILL, KING & DAVIS, Circuit Judges

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

Costs on appeal are to be taxed against plaintiff-appellant.

ISSUED AS MANDATE: June 25, 1992

**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF LOUISIANA**

**LAFAYETTE-OPELOUSAS DIVISION**

| | |
|---|---|
| **PAULINE MENARD** | ***CA NO. 89-2739** |
| **VERSUS** | ***JUDGE PUTNAM** |
| **CITY OF BREAUX BRIDGE, ET AL** | ***MAGISTRATE TYNES** |

---

**JUDGMENT**

---

In accordance with the findings of fact and conclusions of law issued concurrently herewith and the oral reasons set forth by the court at the conclusion of the trial of this matter on August 20, 1991:

**IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of the defendants and against the plaintiff, **PAULINE MENARD**, dismissing all of her claims against all of the defendants.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that all costs of these

proceedings be paid by the plaintiff, **PAULINE MENARD.**

THUS DONE AND SIGNED in chambers in Lafayette, Louisiana, on this 12th day of September, 1991.

UNITED STATES SENIOR
DISTRICT JUDGE

**ORAL REASONS FOR JUDGMENT**

***

Gentlemen, there's not much room for the Court to speculate in this case. I believe that the facts show that Mrs. Menard was discharged because she did not go to the Chief of Police or to one of his authorized officers and report the fact that she had found these photographs or someone else had found them and showed them to her, which was suggestive that there was some criminal activity going on in the Police Department. I don't believe that her dismissal should be condoned or is supported by the fact that she did not go to her superior, one of the other police officers in the Breaux Bridge Police Department, and tell them about what she had found or what had been showed to her in Officer Roger Istre's desk. I don't believe that she did this in bad faith, that she did anything that she didn't think was proper. I think she had

a genuine feeling that if she did report it to the Chief of Police, probably nothing would come of it; and so she and her husband went and consulted with her friend, Mr. Johnson. All of this is pretty clear from the evidence. Johnson told them he couldn't do anything about it. He suggested they call the FBI, and I think when the FBI was finally contacted, the FBI said "Go see the Sheriff." so they called and went to see the Sheriff. they did not go see the Sheriff. they went to see the District Attorney, and they were on their way there when they met his investigator. As I recall the testimony, they then explained this to the investigator; and the investigator then went back to his office. And he, the District Attorney or his investigator, instigated an investigation of the incident by the Sheriff's Department, and

that incident ruled in the arrest of Roger Istre and his dismissal from the force.

Now, we have a situation where all of the defendants in this case, with the exception of the Chief of Police, were instrumental or were the only ones, the only ones in authority who had the power to discharge a police officer. So the Chief went to the Council, wrote them a letter, and recommended that this woman be discharged and that the other officers who also knew of the incident and didn't report it to him be suspended for a certain period of time. I don't believe that Mrs. Menard should have been discharged for this reason. I think she deserved, if anything, the same punishment as meaded out to the other officers who failed to make the disclosure to the Chief. It think there were six other officers, were there not, gentlemen, six

others who were suspended? How many officers were suspended?

MR. CEDARS: Three, Your Honor.

THE COURT: Three. Those three officers were suspended. I don't believe that her dismissal from the force is commensurate with the offense which she allegedly committed, that is to say, as stated, failure to report it to her immediate superior or the Chief. She did report it to a law enforcement officer. That was the District Attorney. The District Attorney did instigate an investigation. It was investigated. Whether or not she was justified not telling the Chief is one thing.

There's no evidence in this case that justifies the conclusion that there might have been some collusion between the Chief and the offending officer, Roger Istre. There was really no evidence to show any connection that it was the Chief and the

activities of Mr. Istre in connection with a juvenile. Nevertheless, gentlemen, I don't believe that the case is one that merits the protection of Section 1983, which requires that a constitutional right be involved. I believe that Mrs. Menard acted in good faith in everything she did, and I believe that the Chief of Police and the defendants also acted in good faith in everything that they did. I don't think that the plaintiff has carried the burden of proving her case in this case by a preponderance of the evidence, that the defendants collectively or individually or willfully acted in their official capacity to deprive her of her rights guaranteed by the Constitution of the United States as provided in Section 1983 of the United Stated Code. So I am going to render judgment in favor of the defendants and against the plaintiff.

I would also say, gentlemen, that I recommend to you that you consider reinstating this lady on the police force. I think she probably is a good officer and has made a good officer in the past. It's true she was under some sort of suspension at the time this incident occurred. She was on probation for that; but whether or not the other three officers who were with her were suspended and whether or not they have been reemployed, I don't know. It wasn't brought out in evidence. I don't know whether they have been reemployed or not. I think that she certainly ought to be reemployed; although I'm not going to order that she be reemployed because I've granted judgment in favor of the defendants. I think her position at least warrants that she be reinstated and she be cleared of any notion that she was darelict in her duty as a police officer

while working for the City of Breaux Bridge or Town of Breaux Bridge.

That's about it, gentlemen. I want to say this to the attorneys. I think you handled the case very well, and you both did the best you could under the circumstances for your clients.

Mr. Cedars, please submit a judgment in keeping with the views that I just expressed and findings of fact and conclusions of law. You have got some already written, but go over them and make sure they are supported by the evidence.

MR. CEDARS: Yes, Your Honor. I will. And I will submit it to Mr. Lucas for his approval as well.

THE COURT: Thank you, gentlemen.

COURT ADJOURNED AT 3:40 P.M.

**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF LOUISIANA**

**LAFAYETTE-OPELOUSAS DIVISION**

| | |
|---|---|
| **PAULINE MENARD** | ***CA NO. 89-2739** |
| **VERSUS** | ***JUDGE PUTNAM** |
| **CITY OF BREAUX BRIDGE, ET AL** | ***MAGISTRATE TYNES** |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The court hereby issues the following findings of fact and conclusions of law in conjunction with the oral reasons for judgment given at the end of the trial of this matter on August 20, 1991:

**FINDINGS OF FACT**

I.

Plaintiff Pauline Menard was employed by the City of Breaux Bridge as a police officer from 1981 until February, 1989. Her main duty was dispatcher.

II.

In October, 1988, plaintiff was suspended without pay for two weeks and

placed on 18 month probation. She was still on probation in February of 1989.

III.

On or about February 14, 1989, a fellow officer, Howard Devillier, discovered evidence in the police station of criminal activity by another police officer. Devillier showed this evidence to plaintiff.

IV.

Plaintiff informed her husband, Eldridge Menard, and Paulma Johnson of this evidence. Neither Mr. Menard nor Mr. Johnson were law enforcement officers. Plaintiff did not act in bad faith in discussing this information with these two persons. Even though there was no evidence of collusion between the offending officer and George Menard, the Chief of the Breaux Bridge Police Department, plaintiff did not report the suspected criminal activity to Chief

Menard or any other Breaux Bridge city policeman. Her husband, reported the existence of the evidence to Steve Champagne, an investigator with the St. Martin Parish District Attorney's office. The officer in question was later arrested by the St. Martin Parish Sheriff's Department and dismissed from the Breaux Bridge police force.

V.

George Menard, as Chief of the Breaux Bridge Police Department, had the authority to recommend the dismissal of plaintiff to the Breaux Bridge City Council. The Council, on behalf of the City of Breaux Bridge, had authority to dismiss plaintiff.

VI.

Chief Menard recommended to the City Council that plaintiff's employment be terminated since she was already on probation and she failed to follow the

chain of command in reporting suspected criminal activity, failed to notify proper legal authorities of this suspected criminal activity, and she discussed sensitive police information with persons who were not law enforcement officers. On February 28, 1989, the Council accepted Chief Menard's recommendation and plaintiff's employment as a Breaux Bridge police officer was terminated.

VII.

Other Breaux Bridge police officers who knew of the suspected criminal activity and failed to report it to Chief Menard were suspended.

VIII.

The dismissal of plaintiff was not commensurate with the misconduct set forth in Chief Menard's recommendation to the City Council but the court finds that defendants did not act in bad faith in dismissing plaintiff from her duties.

## CONCLUSIONS OF LAW

I.

Violation of a public employee's First Amendment rights is determined by balancing the competing interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

II.

Under the facts of this case, the actions of defendants which resulted in plaintiff's dismissal do not rise to such a level to constitute a violation of any constitutional protections afforded to plaintiff under 42 U.S.C. Section 1983.

III.

As such, the dismissal of plaintiff did not violate her rights under the First Amendment to the United States Constitution. Accordingly, as a matter of law, there is no basis in federal law for the imposition of liability against any of the defendants named in this action.

IV.

Judgment shall be entered herein in favor of all defendants dismissing the complaint of Pauline Menard at her cost.

Lafayette, Louisiana, this 12th day of September, 1991.

UNITED STATES SENIOR
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 1 1992
OFFICE OF THE CLERK

No. 92-408

In The

# Supreme Court of the United States

October Term, 1992

PAULINE MENARD,

*Petitioner,*

*vs.*

CITY OF BREAUX BRIDGE, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the dismissal of Pauline Menard, for the disclosure to private citizens of sensitive information regarding the misconduct of a fellow police officer, violate her First Amendment right to free speech?[1]

II. Did the District Court err in finding that the defendants' actions in dismissing Pauline Menard were not in bad faith?

---

1. The first question for review, as articulated by petitioner in her application for certiorari, reads, "Did the firing of Pauline Menard, for reporting child pornography by fellow police officers to the district attorney's office, while on probation for an unrelated matter and without first notifying her superiors, violate her first amendment constitutional right to free speech as further protected under 42 USC 1983?". Respondents contend that this issue has not been accurately framed by petitioner. Specifically, it is respondents' position that, as drafted by petitioner, issue number 1 is an incorrect representation of the factual parameters of this case. The proper issue, in accord with the factual findings of the courts below, is more appropriately set forth above by respondents.

## LIST OF ALL PARTIES

1. **Pauline Menard,** petitioner

2. **City of Breaux Bridge,** respondent

3. **Honorable Louis Kern**, Mayor of Breaux Bridge, respondent

4. **George Menard**, Chief of Police for the City of Breaux Bridge, respondent

5. **Wilbert Alexander**, Alderman, City of Breaux Bridge, respondent

6. **Anthony Hebert**, Alderman, City of Breaux Bridge, respondent

7. **Vernon Blanchard,** Alderman, City of Breaux Bridge, respondent

8. **Neil Melancon,** Alderman, City of Breaux Bridge, respondent

9. **James Hebert**, Alderman, City of Breaux Bridge, respondent

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## STATEMENT OF THE CASE

### A. Statement of Facts

Unless otherwise indicated during the course of this brief, the term "defendants" shall refer exclusively to the respondents: City of Breaux Bridge; Mayor Louis Kern; Chief George Menard; Councilman Wilbert Alexander; Councilman Anthony Hebert; Councilman Vernon Blanchard; Councilman Neil Melancon; and, Councilman James Hebert. The individual defendants (respondents) are members of the Breaux Bridge City Council, the governing authority for the City of Breaux Bridge, Louisiana, except for Chief George Menard who is the duly elected Police Chief for the City. The term "complainant" or "plaintiff" shall refer exclusively to Pauline Menard, the petitioner before this Honorable Court.

The facts surrounding this action, as established at trial, are not significantly disputed. However, the plaintiff's characterization of the factual parameters of this action, as well as inferences drawn therefrom, all as reflected in her writ application, is inaccurate and omits several matters of importance. Hence, the following is presented so that this Honorable Court may have an adequate understanding of the facts which were developed at trial and left undisturbed by the United States Fifth Circuit Court of Appeals.

The Breaux Bridge Police Department is a rural police agency consisting of an elected Chief of Police and fifteen (15) police officials. Tr. 10-12, Vol. 3. George Menard is the elected Chief of Police for the City of Breaux Bridge, having served in that position for approximately twenty-eight (28) consecutive years. Tr. 8-9, Vol. 3. In February, 1989, the plaintiff was a commissioned police officer with the Breaux Bridge Police Department and had been employed in that capacity since 1981. Her duties were primarily

those of a dispatcher. Tr. 10, 76-77, 100, Vol. 3.

On February 14, 1989, at approximately 8:00 o'clock P.M., Howard Devillier, another police officer for Breaux Bridge, Louisiana, found a number of obscene photographs in the desk of a fellow officer, Roger Istre. The photographs were of juveniles and were indicative of possible criminal activity on the part of Istre. Tr. 49-50, Vol. 3; Tr. 80-81, Vol. 3. Officer Devillier took a photograph of the pictures, and then advised plaintiff of what he had discovered, informing her that he was going to investigate the matter to determine if there was any evidence of wrongdoing. Tr. 59, Vol. 3.

Interestingly, the complainant testified at trial that Officer Devillier advised her that he was going to use the photographs for "political purposes". Tr. 81, Vol. 3; Tr. 101, Vol. 3. However, this is disputed by Officer Devillier. Tr. 62, Vol. 3. Notwithstanding the plaintiff's position in this regard, her husband admitted that on the morning after the discovery of the photographs, Officer Devillier informed him that he and Sgt. Ezebe Chevalier, the direct supervisor of both Devillier and the plaintiff, were investigating the matter. Tr. 58, Vol. 3; Tr. 70, Vol. 3; Tr. 34-35, Vol. 4.

In any regard, after learning of the existence of the photographs, the plaintiff told her husband, Eldridge Menard, about them, and he and the complainant then decided to speak with Paulma Johnson for advice although they had previously elected to confer with the District Attorney regarding this matter. Tr. 83, Vol. 3; Tr. 84, Vol. 3; Tr. 18, Vol. 4.[2] At that time, Johnson was a self-employed business man and enjoyed the position of an elected School Board member for St. Martin Parish (county). Tr. 18, Vol. 4. He had no law enforcement experience whatsoever, and was

---

2. Paulma Johnson was incorrectly identified in the trial transcript as "Palmer Johnson". Thecourt reporter's error was obviously phonetical.

simply considered by the plaintiff to be a civic leader. Tr. 23, Vol. 4. Johnson recommended that the complainant and her husband discuss this matter with the Federal Bureau of Investigation since it involved possible criminal activity. Tr. 21, Vol. 4.

Thereafter, the plaintiff's husband conferred with Steve Champagne, an investigator for the District Attorney's Office, and advised him of the suspected criminal activity. This exchange occurred when Eldridge Menard stopped Champagne on the highway, allegedly as he (Menard) was proceeding to the District Attorney's Office to report the discovery of the photographs. Tr. 34, Vol. 3; Tr. 85, Vol. 3. Champagne testified that, to his recollection, the plaintiff herself was not present when her husband relayed the information concerning the pictures. Tr. 35, Vol. 3; Tr. 47, Vol. 3.

Although both the complainant and her spouse testified that the former was in fact present when Eldridge Menard conferred with Champagne, she admittedly did not exit her vehicle and personally speak with Champagne; rather, the entire matter was handled by her husband. Tr. 85-86, Vol. 3; Tr. 96, Vol. 3; Tr. 100, Vol. 3; Tr. 29, Vol. 4. Regardless, Champagne verified that the plaintiff did not *personally* consult with him, any member of the District Attorney's Office or any other law enforcement official regarding the possible illegal activity of Roger Istre. Tr. 41, Vol. 3.

Champagne advised that he could not act upon the information relayed to him until he received additional data, particularly with regard to the identities of the juveniles depicted in the photographs which were not in the possession of the complainant or her husband. Tr. 35, Vol. 3; Tr. 41-42, Vol. 3. Even though the plaintiff and her spouse knew this matter was being investigated by police officers (Tr. 35, Vol. 4), they commenced their own private investigation. Tr. 97-100, Vol. 3; Tr. 30, Vol. 4; Tr. 38, Vol. 4. This unauthorized endeavor resulted in the

identification of one of the juveniles who appeared in the photographs, and the complainant's husband then relayed this data to Champagne, again outside the presence of the plaintiff. Tr. 35, Vol. 3.

The identification of the juveniles by the plaintiff and her spouse was a matter "after the fact". Both Officer Devillier and Sgt. Chevalier testified that on the evening the photographs were discovered, Sgt. Chevalier recognized the juveniles and subsequently conferred with councilman Wilbert Alexander. Tr. 54, Vol. 3; Tr. 57, Vol. 3; Tr. 60, Vol. 3; Tr. 65, Vol. 3. They consulted the juveniles and their parents to ascertain precisely what had occurred. Tr. 65-66, Vol. 3; Tr. 49-51, Vol. 4. Both testified that once they were satisfied that Istre was engaged in criminal activities, the appropriate actions would be taken by them inclusive of advising their Chief of the situation. Tr. 54-55, Vol. 3; Tr. 67, Vol. 3.

Upon receipt of the additional information from the complainant's husband, Champagne immediately informed his superior, an Assistant District Attorney. They then met with Sheriff Charles A. Fuselier and his juvenile officers. A formal, immediate and intensive investigation ensued, the result of which was the arrest of Roger Istre on February 17, 1989. Tr. 36, Vol. 3. Prior to the arrest of Istre, Sheriff Fuselier alerted CHIEF GEORGE MENARD of the investigation and the likelihood that one of his police officers would be arrested. Tr. 17, Vol. 3.

Thereafter, upon the arrest of Istre, Chief Menard conferred with Louis Kern, the Mayor of the city of Breaux Bridge, and City Attorney, Michael A. Harris. Tr. 73-74, Vol. 4; Tr. 81-82, Vol. 4. During the days immediately following the arrest of Istre, there were several conferences among the aforesaid city officials (Chief Menard, Mayor Kern and Attorney Harris), personnel from the St. Martin Parish Sheriff's Office (including Sheriff Charles A.

Fuselier), and members of the District Attorney's Office. Tr. 73-74, Vol. 4; Tr. 81-82, Vol. 4. All of the facts surrounding the investigation and activities of Istre, and the discovery of the photographs which led to his arrest, were disclosed and discussed in detail. Tr. 73-74, Vol. 4; Tr. 81-82, Vol. 4; *see* Exhibit P-10, R. 76, Vol. 4.

Assured with the knowledge that Istre would be properly charged and prosecuted, Chief Menard's focus was then directed to those police officers within his department who had learned of the possible criminal activity of Istre, but had failed to report it to him. Therefore, Chief Menard, on February 20, 1989, suspended all police officers who had learned of the heinous misconduct of Roger Istre, but had not properly disclosed it. Chief Menard had concluded that, without justification, those officers had ignored basic police procedures inherent in their respective positions including, but not limited to, the failure to follow an appropriate chain of command. Tr. 21-25, Vol. 3.

After much deliberation, and in accordance with state law, Chief Menard recommended that the governing authority of the city reprimand, by way of suspension without pay, the police officers described in the foregoing paragraphs. As to the plaintiff, Pauline Menard, his recommendation was that she be dismissed since she was currently on probation for previous misconduct which included a contumacious failure to cooperate with her fellow officers. *See* Exhibits D-1 and D-2, R. 23, Vol. 3; R. 24, Vol. 3.[3] By law, only the Breaux Bridge City Council, the governing authority of the City of Breaux Bridge, could actually impose the recommended punitive measures. Tr. 84, Vol. 4; *see* La.R.S. 33:423.

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3. Both exhibits have been reproduced and are contained in the Appendix to this opposition brief. Exhibit D-1 is attached as Appendix A, and Exhibit D-2 is identified as Appendix B.

The recommendation of Chief Menard was reviewed by the City Council during an executive session held at a public meeting on February 28, 1989. Tr. 74, Vol. 4; Tr. 87, Vol. 4. The course of the entire investigation was shared with the Council, as well as the bases for the recommendations of Chief Menard. Tr. 83-84, Vol. 4; Tr. 97, Vol. 4; Tr. 100-101, Vol. 4; Tr. 58, Vol. 4; Tr. 70-71, Vol. 4; Tr. 93-94, Vol. 4; *see* Exhibit P-10, R. 76, Vol. 4.[4] Although the plaintiff, Pauline Menard, was invited to confer with the Council in executive session regarding the Chief's recommendation, she refused to do so. Tr. 85-86, Vol. 4. Finally, the City Council accepted the Chief's recommendation and terminated the complainant's employment. Tr. 62, Vol. 4. However, prior to acting, the Council was assured by its attorney, Michael A. Harris, that there was sufficient documentation in support of the recommendation of Chief Menard, and that their actions were supported by law. Tr. 71, Vol. 4; Tr. 83, Vol. 4.

At this juncture, it is of more than passing import to note that in February, 1989, Eldridge Menard, the plaintiff's spouse, had previously pled guilty to the crime of false swearing under La.R.S. 14:125. Tr. 38-39, Vol. 4. Furthermore, he had felony charges of aggravated battery pending against him. Tr. 37-38, Vol. 3; Tr. 12, Vol. 4.

**B. Course of Proceedings and Disposition in Lower Courts**

On November 27, 1989, the plaintiff instituted this litigation in the Western District of Louisiana alleging that her termination from the Breaux Bridge Police Department was in violation of federal law, specifically, the First Amendment to the United States Constitution. R. 1, Vol. 1. Jurisdiction of the court of first instance was premised upon 28 U.S.C. §§1331 and 1343 since claims were urged under the First Amendment and 42 U.S.C. §§1983 and 1988.

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4. This exhibit is contained in the Appendix to this brief, marked as Appendix C.

On August 19,1991, and August 20, 1991, the case was tried, without a jury, before the Honorable Richard J. Putnam. After the trial, the court dismissed the complainant's claims on the basis that her dismissal did not violate her First Amendment rights. Formal Findings of Fact and Conclusions of Law, and a judgment in accordance therewith, were signed by the trial court on September 12, 1991. R. 110-114, Vol. 1; *see* pages A11 - A16 of Appendix to petitioner's writ application. Plaintiff appealed the trial court's decision on September 24, 1991. R. 115, Vol. 1. The decision of the trial court was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit on June 25, 1992. *See* page A1 of Appendix to Petition for Writ of Certiorari filed by Pauline Menard.

## SUMMARY OF ARGUMENT

The speech activity of a public employee is entitled to constitutional protection under the First Amendment provided a two prong test is satisfied:

1. The speech of the public employee must address a matter of public concern as determined by its content, form and context. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *and*

2. The interests of the employee in commenting upon the matter outweighs the employer's interests in promoting the efficiency of the public services it performs. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Thompson v. City of Starkville, Mississippi*, 901 F.2d 456 (5th Cir. 1990).

Even if the plaintiff-employee satisfies both prongs of the aforementioned test, he will not prevail in a First Amendment

action until and unless he demonstrates that the "protected speech" was the motivating factor behind his termination. *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989).

The threshold inquiry, therefore, is whether the plaintiff's "speech activities" addressed a "matter of public concern". In the case at bar, defendants contend that the complainant disseminated sensitive information of possible police misconduct to private citizens with no connection to law enforcement. There was no justification for her actions in this regard. Hence, under the facts of this case as developed at trial, the form and context of plaintiff's "speech" do not merit the protections of the First Amendment. Therefore, no further inquiry is necessary since complainant cannot prevail on this initial issue.

Nevertheless, assuming that the speech did in fact meet the first criteria in question (matter of public concern), defendants submit that the plaintiff's actions demonstrate a lack of trust and confidence in both her superior and fellow officers. Furthermore, the unauthorized "investigation" of the possible criminal misconduct of Istre by the complainant and her husband, a private citizen with a criminal record, could have impeded the operations of the police department. As such, the police officers associated with the Breaux Bridge Police Department cannot, in view of the plaintiff's misconduct, fully and completely trust that she will be able to handle sensitive information in a professional manner. Likewise, each of them necessarily questions what data can and should be shared with her, irrespective of the fact that her position invites the receipt of confidential communications on a daily basis.

Trust, loyalty, confidence and close working relationships within a police department are essential ingredients for the effective, efficient delivery of police services, as the evidence at

trial demonstrated. Furthermore, the jurisprudence of this country has frequently recognized the need to aggressively protect against the erosion of such mandatory components of a law enforcement agency. *Connick v. Myers, supra*; *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983); *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984); *Kelley v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976).

Therefore, in light of the aforementioned, the plaintiff's interests attendant to her "speech activities" do not supersede those of the Breaux Bridge Police Department with respect to the promotion of the important services it provides. The employer's interests under the facts of this case are greater than any First Amendment rights which may inure in favor of the complainant-employee. Thus, her speech activities are necessarily void of any constitutional protection under the First Amendment.

Next, if the plaintiff should prevail with respect to establishing that her conduct was constitutionally protected (if the complainant satisfies the two prong test set forth herein), then defendants submit that her claims must nevertheless be denied. Particularly, the evidence of record unequivocally proves that her dismissal was the consequence of her *failure* to report the criminal activities of Istre to her superior or proper law enforcement officials, as well as her sharing of confidential data with unauthorized citizens. Contrary to the arguments expressed in her brief submitted to this Court, plaintiff was not dismissed because she, indirectly through her spouse, notified the District Attorney's Office of the possible misconduct of Istre. Further, the defendants based their decision to dismiss the complainant in significant part upon the fact that at the time of her actions, she was on departmental probation because of previous misconduct.

Lastly, and on an alternative basis, no liability should be assigned to the defendants because they enjoy qualified immunity.

From an objective standpoint, their conduct in dismissing Pauline Menard from her employment was, and remains, reasonable and warranted. Additionally, *under the facts* of the case before this Honorable Court, the First Amendment rights of the plaintiff to engage in the allegedly protected "speech activities" were not, and are not, clearly established by law.

As a consequence of all of the above, the decisions of the lower courts are correct and complainant's Petition for Writ of Certiorari should be dismissed.

## REASONS FOR DENYING THE WRIT

### I.

### THE DISMISSAL OF PAULINE MENARD, FOR THE DISCLOSURE TO PRIVATE CITIZENS OF SENSITIVE INFORMATION REGARDING THE MISCONDUCT OF A FELLOW POLICE OFFICER, DID NOT VIOLATE HER FIRST AMENDMENT RIGHT TO FREE SPEECH.[5]

This action is based upon 42 U.S.C. § 1983 which protects all citizens of this country from the deprivation of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States. In particular, the plaintiff alleges that her civil rights have been violated because of a deprivation of her First Amendment rights to freedom of speech. The primary issue, therefore, is whether the firing of Pauline Menard by the defendants constitutes an unacceptable restriction of her First Amendment rights.

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5. As noted in footnote 1, *supra*, respondents have framed this argument differently than that of the petitioner. It is respondents' contention that argument number 1, as articulated by petitioner, is not in accord with the factual parameters of this action.

Public employers may not interfere with an employee's right to free speech under the First Amendment simply because the content of the speech may be objectionable to a superior. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). However, the jurisprudence of this country has recognized that an employer has a competing concern to maintain the workplace free from unnecessary disruption. *Pickering v. Board of Education*, supra; *Connick v. Myers*, supra. Therefore, when the interests of the employer and employee clash, the Court must balance the legitimate concerns of each in determining whether an employee's speech is worthy of First Amendment protection. *Pickering v. Board of Education*, supra.

In *Thompson v. City of Starkville, Mississippi*, supra, the court succinctly, yet accurately, defined the apropos analysis to be applied in determining whether particular speech conduct of a public employee deserves constitutional protection as follows:

> In order to establish a constitutional violation [the plaintiff] must first prove that her speech involved a matter of public concern. . . . Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the efficiency of the public services [they] perform." . . Third, she must show that her speech motivated the defendants' decision to fire her. [Citations omitted.]

Moreover, the content, form and context of a given statement must be closely scrutinized in order to ascertain whether the speech addresses an issue of "public concern". *Connick v. Myers, supra.* The speech must be examined in view of the entire record and not in a vacuum. *Connick v. Myers, supra,* at 147-148. As such, a case

by case analysis is required. *Thompson v. City of Starkville, Mississippi*, supra; *Price v. Brittain, supra.*

Under the jurisprudence, the burden of persuasion in a First Amendment case lies with the employee to demonstrate that the speech under scrutiny addresses a matter of public concern *and that* the employer's interests are subservient to those of the employee with respect to the challenged speech. *Price v. Brittain*, supra; *Thompson v. City of Starkville, Mississippi, supra.* Although the law at first blush seems unclear as to the party who bears the burden of proof to demonstrate that the speech in question was the motivating factor behind the employee's termination, the language of the Court in *Mt. Healthy City School District v. Doyle, supra*, clearly places this burden upon the employee:

> Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him

*See also, Price v. Brittain, supra*, at 257.

In view of the foregoing, these legal principles can be extracted with ease. A two prong test must be satisfied to determine if an employee's speech warrants constitutional protection under the First Amendment:

> A. The employee must demonstrate that the speech was a matter of public concern as determined by an analysis of its content, form and context. *Connick v. Myers, supra*; *Thompson v. City of Starkville, Mississippi, supra*; *and*

B. The employee must establish that her interests in commenting upon a "matter of public concern" outweighs the competing employer's interests in promoting the efficiency of the public services it discharges. *Pickering v. Board of Education*, *supra*; *Price v. Brittain*, *supra*; *Thompson v. City of Starkville, Mississippi*, *supra*.

If both criteria are satisfied, the employee must further prove that the "protected speech" was the motivating factor behind her termination. The "speech" will not be "constitutionally protected" if there is a failure in any one of the foregoing tests. *Mt. Healthy School District v. Doyle*, *supra*; *Price v. Brittain*, *supra*. If the complainant-employee carries this burden of persuasion, then the employer may nevertheless prevail if it is shown that the employee would have been dismissed even in the absence of the protected conduct. *Mt. Healthy City School District v. Doyle*, *supra*, at 576; *Price v. Brittain*, *supra*, at 257.

In this case, the courts below concluded that the plaintiff failed to prove that her speech merited constitutional protection. R. 5-6, Vol. 4; Pages A11 - A16 of the Appendix to petitioner's writ application; R. 112-113, Vol. 1. Under the facts of this action, as reflected by the entirety of the record, defendants contend that the courts below were correct in that the complainant failed to prove that her speech was a matter of public concern and/or that the interests of the City of Breaux Bridge, through its police department, were outweighed by her right to comment upon the incident involving Roger Istre. Each element of plaintiff's claims to the contrary shall be hereinafter reviewed in order to depict the validity of defendants' contentions.

**A. The actions of Pauline Menard did not address a matter of public concern.**

The threshold question before the Court is whether the plaintiff's speech activities deserve First Amendment protection

because they addressed a "matter of public concern". As previously noted, this exploration must be conducted with due regard to the content, form and context of the complainant's activities as revealed by the entire record. *Connick v. Myers*, 103 S. Ct. at 1690; *Thompson v. City of Starkville, Mississippi, supra*, at 461. Initially, therefore, the speech conduct of the plaintiff which led to her dismissal must be closely analyzed.

Throughout her argument expressed in the petition for certiorari, the plaintiff, either expressly or inferentially, repeatedly and incorrectly argues that her dismissal was precipitated by the fact that she informed the *District Attorney's Office of the alleged misconduct of Roger Istre. See* pages 7, 8, 27, 40 and 42 of the Petition for Writ of Certiorari. This is incorrect and inaccurate. Chief George Menard recommended the plaintiff's termination because: (1) She did not follow a chain of command in reporting the suspected activities of Istre; (2) She failed to notify proper legal authorities of the suspected criminal activities; (3) She discussed sensitive police information with persons who were not law enforcement officials; and (4) She was on probation for prior misconduct.

*See* Exhibits D-1 and D-2, R. 23, Vol. 3; R. 24, Vol. 3; Appendixes A and B; Tr. 17, Vol. 3; Tr. 22-24, Vol. 3. The City Council of Breaux Bridge, through its individual councilmen, acted affirmatively upon Chief Menard's recommendation once it satisfied itself that there were valid bases for the recommendation of dismissal. Tr. 83-84, Vol. 4; Tr. 97-101, Vol. 4; Tr. 58, Vol. 4; Tr. 70-71, Vol. 4; Tr. 93-94, Vol. 4. *This was an express Finding of Fact by the trial court. See* R. 111, Vol. 1; Pages A11-A16 of Appendix to plaintiff's Petition for Writ of Certiorari. In fact, the trial court never found that plaintiff's dismissal was the product of any information presented to the District Attorney's Office.

Plaintiff's assertion that she was dismissed because she reported the activities of Istre to the District Attorney's Office is

further shown by the record to be fallacious by the following. First, as established in the "Statement of the Case", Pauline Menard never reported the incident to the District Attorney's Office. Secondly, and more importantly, the fact that the District Attorney was advised of Istre's misconduct was never a reason relied upon by any of the defendants in recommending and/or voting to dismiss the plaintiff, as noted in the foregoing paragraph. Each of the councilmen denied the allegation when examined on that particular point. As a matter of fact, one councilman, Vernon Blanchard, testified that when he voted to accept the recommendation of Chief Menard, he was not even aware that the District Attorney had been advised of the Istre matter. Tr. 67, Vol. 4.

Defendants do not dispute that the *content* of the plaintiff's speech activities is worthy. However, the *form and context* in which her statements were uttered clearly do not satisfy the necessary standards so as to qualify as a "matter of public concern". In particular, one must not lose sight of the fact that at least two (2) individuals were informed by the complainant of the misconduct of Istre *before* any law enforcement officials were contacted by either the plaintiff or anyone acting on her behalf. Further, a third person, Janet Thibeaux, was advised of the activities of Istre. While complainant attempted to argue that the latter was informed because she was a Sheriff's Deputy, the testimony does not support this allegation. Tr. 102-103, Vol. 3. For example, the plaintiff and her husband commenced an independent investigation in order to determine the identities of the juveniles who may have been involved after Thibeaux was informed. Tr. 38, Vol. 4; Tr. 30, Vol. 4; Tr. 97-100, Vol. 3.

The complainant attempts to excuse her conduct because she was fearful of retribution, she had no idea of who within the Breaux Bridge Police Department was involved, and she felt that if Chief Menard was advised, he would not take appropriate action. These

"excuses" are inconsistent, without adequate support from the record and, even if valid, do not justify her relaying sensitive police information to citizens. The plaintiff, who had vast experience in law enforcement, and who admitted that she knew countless police officers (from state policemen to Sheriff Charles A. Fuselier himself), failed to advise anyone except private citizens of her suspicions concerning Roger Istre. See Tr. 108-110, Vol. 3.

The plaintiff was acutely aware that Officer Howard Devillier and Sgt. Ezebe Chevalier (her immediate superior), as well as a city councilman, were investigating the discovery of the Istre photographs. Tr. 35, Vol. 4. Even though she contends that she did not know which officers may or may not have been involved with Istre in the suspected illegal activities, on cross-examination, the complainant nevertheless admitted that she had no reason to suspect any police officers except Roger Istre; in fact, she could articulate no specific reason she suspected or distrusted any other fellow officer. Tr. 108-110, Vol. 3. As to her supposed fear of retribution, neither she nor her husband ever related such to Steve Champagne, the investigator with the District Attorney's Office. Tr. 40, Vol. 3.

The plaintiff has maintained in the course of this litigation that she was unaware of which desk contained the photographs in question - Istre's or Assistant Chief Thibodeaux's. A close scrutiny of the record will demonstrate that, at least as early as the morning after the discovery of the photographs, the plaintiff's husband knew that the pictures had been found in Istre's desk. Tr. 25, Vol. 4. Therefore, it is difficult to surmise that the complainant was unaware of this fact. Tr. 81, Vol. 3. Additionally, the information which was initially given to Steve Champagne of the District Attorney's Office was that Istre was the one involved in the misconduct. Tr. 34, Vol. 3.

The complainant further argues that she felt that Chief Menard

would have taken no action against Roger Istre if she had in fact advised him of the existence of the pictures. To support this position, the plaintiff contends in vain that Chief Menard had not properly handled incidents of misconduct in the past. Tr. 25, Vol.4; Tr. 83, Vol.3. Nonetheless, no such evidence was ever presented except vague testimony from her husband about an incident between Istre and an employee which occurred several years in the past. Tr. 25, Vol. 4. The nature of the event was characterized by Istre as "horsing around". No evidence to the contrary was adduced except the vague testimony of the complainant's husband. Tr. 32, Vol. 3. The trial court found that there was no evidence to support any belief that Chief Menard was involved and/or would not have acted properly upon receipt of information regarding Istre's misconduct. *See* Oral Reasons for Judgment, page A-4 of petitioner's writ application; page A-12 of writ application — trial court's Findings of Fact and Conclusions of Law, Number IV.

Defendants submit that the record of this case, viewed in its totality, does not sanctify the speech activities of Pauline Menard, particularly with reference to her sharing sensitive police information with private citizens. The Court is again reminded that her dismissal was, primarily, the product of her advice to private citizens and *her* failure to notify *any* law enforcement authorities of the existence of the obsene photographs. Her termination was not, as plaintiff incorrectly argues, the result of reporting the Istre matter to the District Attorney's Office. Hence, although the content of the complainant's speech involved a matter of import, when judged in light of its *form and context,* it does not rise to the level of constitutional proportions, as the courts below correctly held.

**B. The plaintiff's interests, if any, do not outweigh those of the defendants in their position as a public employer.**

The Court is called upon to balance the competing interests of

the plaintiff and defendants only if it concludes that the complainant's speech activities addressed a matter of public concern. Although defendants contend that the plaintiff will be unable to satisfy this requirement, out of an abundance of caution, the following is submitted for the Court's edification.

The mechanics of the process of balancing the interests of a public employee and a public employer in the context of the First Amendment were initially discussed in detail in *Pickering v. Board of Education, supra.* In examining the right of the plaintiff teacher to express his criticism of the School Board's handling of certain matters, the Court in that case studied the teacher's comments against the School Board's desire to suppress same in relation to its day-to-day operations. In concluding that the teacher's exercise of his freedom of speech would not furnish a basis for his dismissal, the Court found that there is, "no question maintaining either discipline by immediate superiors or harmony among co-workers" and further, that the employment relationships, "are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary for their proper function." *Pickering, supra,* at 570. The court also noted that the case did not present a situation in which the statements of the teacher were "so closely related to the day-to-day operations of the schools that any harmful impact on the public will be difficult to counter because of the teacher's presumed greater access to the real facts." 391 U.S. at 572.

This Honorable Court followed the reasoning of the *Pickering* case in the decision of *Connick v. Myers, supra.* In that action, the District Attorney for the Parish of Orleans, Louisiana, decided to transfer the plaintiff, an Assistant District Attorney, to a different division within his department. The assistant strongly opposed the transfer and expressed her view to several of her supervisors, including Connick, the District Attorney. Shortly thereafter, she prepared a questionnaire and distributed it to other Assistant

District Attorneys in the Connick office. The questionnaire addressed several matters including whether various employees felt pressured to work in political campaigns. When he learned of this questionnaire, Connick informed his assistant that she was being terminated for refusal to accept the transfer, and that her distribution of the questionnaire was considered an act of insubordination. The assistant then filed a Section 1983 action alleging that her dismissal constituted an infringement upon her constitutionally protected right of freedom of speech.

The Court concluded that the behavior of the employee, the Assistant District Attorney, was calculated to lead to the disruption of the District Attorney's Office, thus undermining the authority of the employer and destroying the close working relationships which are essential to the office. Therefore, in refusing to find that her dismissal was offensive to the First Amendment, the Court stated:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

Thus, as noted by both the *Pickering* and *Connick* cases, the First Amendment rights of the public employee must be balanced against the competing interests of the employer as determined by matters such as: the necessity for close working relationships; the need for trust, loyalty and confidence between employer and employee; the sensitivity of the context of the alleged protected speech; the need to maintain confidentiality within the employer's business realm; the manner, time and place of the speech; the context in which the speech arose; and, the effect the speech may have upon the public employee to discharge the duties of his position.

The jurisprudence of this country has, time and again, recognized that a police department has a significant governmental interest in regulating the speech activities of its officers in order to instill public confidence in the law enforcement institution and to promote trust and confidence within the department itself. *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983). Likewise, a police department has a significant governmental interest in developing efficiency, loyalty, discipline, esprit de corps, and uniformity in its operations. *Kelley v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976); *Hughes v. Whitmer, supra*; *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984). Therefore, it is not unreasonable to expect police officers to adhere to a policy or procedure which creates a chain of command and to discourage the unrestrained dissemination of sensitive police data.

On page 24 of her writ application, the plaintiff states that, "The defendants did not introduce any evidence of disruption of the general performance and operation of the police department." However, each police officer who testified in this action verified that it is essential to the operation of a police department that there be a high degree of trust and loyalty among the officers and their superiors. Moreover, confidentiality is a necessary ingredient for a stable, efficient police department. Tr. 42-43, Vol. 3 (Captain Steve Champagne); Tr. 71-73, Vol. 3 (Sgt. Ezebe Chevalier); Tr. 27-28, Vol. 3 (Chief George Menard). Even the sharing of sensitive information with one's spouse is considered counterproductive to the objectives of a police department. Tr. 72, Vol. 3. Additionally, proper police practices demand, at a minimum, that an officer's superiors be advised of any misconduct whether of a fellow officer or a private individual. Tr. 58-59, Vol. 3.

As has been previously established in this disquisition, the complainant had no reason to suspect that anyone other than Roger Istre was involved in possible misconduct. Although she had

known Chief George Menard for several years, and despite the fact that she was close friends with her immediate supervisor, Sgt. Ezebe Chevalier (Tr. 73, Vol. 3), the plaintiff elected to share confidential, sensitive information with no law enforcement officer within the Breaux Bridge Police Department, or with any other agency for that matter. Her lack of trust and confidence in, and loyalty to, her superiors and fellow officers is without question. Against this backdrop, therefore, defendants submit that the complainant could not, as a consequence of her "speech activities", continue to properly function as a police officer within the Breaux Bridge Police Department, particularly in view of its small size.

On pages 27-28 of plaintiff's petition for certiorari, she further contends that her actions were not of the type that would adversely affect the functions of the Breaux Bridge Police Department.[6] This argument is clearly without merit in that not only did her conduct (the dissemination of sensitive police data) create a dangerous situation which could have impaired the ongoing investigation of Officer Devillier and Sgt. Chevalier, but it also undermined the trust and confidence of other Breaux Bridge police officers in her with regard to future investigations. Simply because the Sheriff's investigation, initiated at the request of the District Attorney's Office, led to the arrest of Istre, complainant requests that this Honorable Court ignore the potentially disruptive and dangerous impact of her activities. Although no direct and immediate harm resulted from the plaintiff's conduct, the defendants' concerns about Pauline Menard's future activities and the negative impact

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6. It appears that the plaintiff's arguments in this respect are premised upon the assumption that her "speech conduct" which led to her dismissal was the reporting of the misconduct of Istre to the District Attorney's Office. As has been previously noted, the termination of Menard from her employment was not related to her speech activities vis-a-vis the District Attorney; rather, it was the product of her dissemination of sensitive police data to private citizens, as opposed to any of her superiors, particularly while she was on probationary status. In any regard, the conduct of the plaintiff demonstrated a total lack of trust, confidence and loyalty in her fellow officers, as previously established.

thereof are well grounded.

Accordingly, when the balancing test established by *Pickering v. Board of Education*, *supra*, is employed in the case before this Honorable Court, it will be seen that the plaintiff's "speech activities" do not rise to the level of constitutional protection.

**C. The Bases of the Plaintiff's Dismissal**

The consideration of whether the speech activities of Pauline Menard were the reason for her dismissal is unnecessary until and unless this Honorable Court has determined that her conduct is in fact protected under the First Amendment. Defendants maintain that an adjudication of this case will not entail an examination of the bases for the plaintiff's termination since her speech conduct is not constitutionally protected, as the courts below ruled. Nonetheless, the following is submitted in response to the complainant's arguments on this particular point.

Plaintiff incorrectly contends in her application for certiorari that it was the reporting of the Istre matter *to the District Attorney* which precipitated her termination. As has been established time and again in this disquisition, the complainant's dismissal centered upon *her failure* to report the matter to any police official, including her superior(s), as well as her actions in advising private citizens with no association to law enforcement of the possible criminal activities of Istre. Also, plaintiff ignores the fact that she was on departmental probation because of previous misconduct concerning her dissemination of police communications.

As support for her claims that her dismissal was a consequence of her husband's advice to the District Attorney, the complainant argues that none of the other officers who failed to report the Istre matter to their superiors were fired. The plaintiff fails to recognize, however, that of all of the officers who neglected to report the incident, she was the only one on departmental

probation. Moreover, unlike the complainant, the only "private citizen" the other officers notified was Wilbert Alexander, a city councilman, who, as part of the governing authority of the City of Breaux Bridge, is the employer of all police officers. *See* La.R.S. 33:423. Additionally, the other officers were in fact suspended, without pay; and, Officer Devillier and Sgt. Chevalier had taken affirmative, official action to investigate the alleged criminal conduct of Istre.

On pages 29-33 of petitioner's application for certiorari, complainant alludes to comments made in a report prepared by City Attorney, Michael A. Harris (Exhibit P-10, R. 76, Vol. 4; Appendix C to this brief), to the effect that allegations had recently surfaced regarding the misconduct of other officers involving juveniles. The plaintiff argues, therefore, that the Breaux Bridge Police Department was "one of corrupt and rampant policy [sic] impropriety". Thus, no close working relationship could or would be adversely affected by disclosure of that misconduct by plaintiff.[7]

It must be noted that at no time did complainant or her husband ever allude to the report of Harris, or any of the allegations contained therein. Clearly, this "report" does not establish any basis for remarks that the police department was "corrupt" and that "rampant" police impropriety prevailed; and, the contents of the report cannot be said to have been the reason for the plaintiff's mistrust. Moreover, the statements in the report are mere allegations with no supporting evidence. Accordingly, no action which plaintiff adopted, or failed to adopt, had any relationship to

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7. Apparently, the plaintiff also relies upon the report of Harris as proof that she could trust no one within the department; hence, she contends she was justified in her failure to notify her superiors and other fellow law enforcement officials. However, nowhere in her testimony does the plaintiff ever allude to having been privy to any of the statements, allegations or information contained in the report of Harris.

that report. Out of fairness and a sense of thoroughness, as previously indicated, Harris' report is attached as Appendix C to this brief. As can be seen from a mere perusal thereof, the bulk of that report is hearsay, innuendo and concludes with voluminous recommendations by Harris.

In conclusion, the entirety of the record in this case discloses that the only bases for plaintiff's dismissal are those identified in Exhibit D-1, a copy of which is found in Appendix A. The alleged "speech conduct" of the complainant, under the facts of this action, simply does not warrant any constitutional protection whatsoever.

## II.

## THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE DEFENDANTS' ACTIONS IN DISMISSING PAULINE MENARD WERE NOT IN BAD FAITH.

The plaintiff correctly acknowledges that the trial court found that the defendants in this case acted in good faith. Tr. 5, Vol. 4; R. 112, Vol. 1; Pages 4-10 of Appendix to petitioner's writ application. Thus, this finding of "good faith" is tantamount to a recognition of the valid defense of qualified immunity. *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991). The application of the defense of qualified immunity was recently and accurately set forth in *Thompson v. City of Starkville, Mississippi, supra*, at 468-469, wherein the following guidance was given:

> "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken. . . ."

> *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982). Thus, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039.

Defendants admit that a public employee's right to free speech was well established in our jurisprudence on the date of the plaintiff's dismissal. However, the case-by-case analysis required by the jurisprudence in First Amendment cases makes it difficult for government officials to, ipso facto, ascertain whether under any particular factual circumstances an employee's speech conduct merits constitutional protections. This was recognized by the court in *Noyola v. Texas Department of Human Resources*, 846 F.2d 1021 (5th Cir. 1988) where the court observed:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." (citations omitted)

*See also, Thompson v. City of Starkville, Mississippi, supra*, at 469-470.

A detailed recitation of the factual perimeters of this case before this Honorable Court would be superfluous. However, as has been established previously, the defendants herein conferred with their City Attorney, Michael A. Harris, and were assured that there was a valid basis for the dismissal of the plaintiff. Furthermore, the advice of their counsel was the product of a thorough investigation of the situation before it. Tr. 83, Vol. 4; Tr. 71, Vol. 4.

Therefore, the conduct of Pauline Menard, when viewed in light of the peculiar facts of this case, does not portray any "clearly established" rights under the First Amendment. Likewise, the actions of the defendants were obviously, and without question, objectively reasonable. Hence, the defendants before this Honorable Court, under any circumstances, should be shielded from liability under the defense of qualified immunity as recognized and applied by the jurisprudence of this country.

## CONCLUSION

Defendants contend that under the facts of the case at bar, the speech activities of Pauline Menard do not merit immunity under the First Amendment for several reasons. First, when viewed in light of the entirety of the record established at trial, the plaintiff's speech does not satisfy constitutional standards because of its form and context. Specifically, the complainant did not have sufficient justification for disclosing confidential, sensitive police data to her husband and other private citizens, none of whom enjoyed any relationship to law enforcement. Additionally, inherent in her duties as a police official was the mandate that she immediately advise her superior, and/or any other law enforcement official, of the alleged misconduct of Istre.

Moreover, the plaintiff's conduct demonstrates that, without justification or any articulative reason, she had little or no trust in either her superiors or fellow officers within the Breaux Bridge Police Department. The unauthorized dissemination of sensitive, confidential police information, and her complicity in an "investigation" concerning the alleged criminal conduct of Istre, undermine the very bases upon which police departments must operate. Without question, Pauline Menard's "speech activities" renders it impossible for her to serve as an officer of the law with the City of Breaux Bridge. Any rights she may enjoy under the First Amendment are pale by comparison to the interests and objectives of the Breaux Bridge Police Department to effectively discharge its duties.

Essentially, the dismissal of the complainant was as much the result of her failure to speak as it was the exercise of her "right" of speech; i.e., her failure to report suspected criminal conduct to appropriate authorities. Defendants contend that it is clear and unequivocal that the actions of PAULINE MENARD erode the competence, respect and professionalism which must prevail within a police department. The best interests of the public demanded her dismissal.

Furthermore, the actions of the defendants with regard to the plaintiff's termination were, and are, objectively reasonable and in good faith. Moreover, the "speech conduct" of the complainant did not introduce "clearly established" rights under the First Amendment when viewed in light of the *entire* record of this case. Likewise, the defendants relied upon independent investigations by their City Attorney, as well as his assurances that a factual basis existed for affirmatively acting upon the recommendation of Chief George Menard.

In consideration of all of the foregoing, it is defendants' position that the judgments of the courts below are correct in all

respects. Therefore, this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

CHESTER R. CEDARS
Attorney at Law
Post Office Box 845
Breaux Bridge, LA 70517
318/332-4586
Bar Roll Number: 3956
*Counsel for Respondents, City of Breaux Bridge, Mayor Louis Kern, Chief George Menard, Councilman Wilbert Alexander, Councilman Anthony Herbert, Councilman Vernon Blanchard, Councilman Neil Melancon, and Councilman James Herbert*

## APPENDIX A — LETTER DATED FEBRUARY 20, 1989

CITY OF BREAUX BRIDGE
POLICE DEPARTMENT
221 MAIN ST.
BREAUX BRIDGE, LOUISIANA 70517

PHONE 332-2186

February 20, 1989

GEORGE MENARD
CHIEF

Officer Pauline Menard
Breaux Bridge, Louisiana

Re: Suspension From Duties

Dear Pauline:

It is my duty to notify you that, effective immediately, you are suspended from your police duties for an indefinite period of time. I am recommending to the Mayor and City Council that this suspension be without pay. I am further recommending that because your conduct is substantially similar to conduct for which you were previously suspended, your employment with the Breaux Bridge Police Department be terminated.

This action results from your failure to advise your superiors, specifically myself and Assistant Chief Thibodeaux of evidence you were aware of pertaining to the possible misconduct of a fellow officer. Further, you failed to notify the proper legal authorities, in violation of your sword duty to so act. In addition,

you provided this information to a civilian outside the police department. These actions are contrary to department policy, and adversely reflects upon your ability to perform duties as a police officer.

This suspension will be effective immediately.

Sincerely,

George Menard
Chief of Police

cc: Mayor Louis Kern

## APPENDIX B — LETTER DATED OCTOBER 25, 1988

CITY OF BREAUX BRIDGE
POLICE DEPARTMENT
101 Berard St.
BREAUX BRIDGE, LOUISIANA 70517
PHONE 332-2186

October 25, 1988

GEORGE MENARD
CHIEF

Mrs. Pauline Menard
Agnes Drive
Breaux Bridge, Louisiana 70517

In Re: Suspension from Duties

Dear Pauline:

As a result of a number of incidents which have occurred within the past several days, I am, notifying you that you are suspended for a period of two weeks.

I have recommended to the Mayor and the City Council that you be suspended without pay for that period of time and also notify you that you are placed on Departmental probation for a period of eighteen months.

This action results from several incidents which go directly to your ability to perform the duties required of you as a Police Dispatcher for the City of Breaux Bridge Police Department.

*Appendix B*

The reason this action is taken is that you have refused to deal with Mr. Ezebe Chevalier, a superior officer, and have refused and/or failed to comply with direct orders from Mr. Chevalier, and have further failed to relay vital information to him as a result of complaints made to the Breaux Bridge Police Department.

It has come to my attention that you failed to notify officers who should be aware of calls for backup situations which may imperil their lives and have failed and refused to answer the radio and telephone because you did not wish to speak to personnel in question.

You have also tied up the telephone lines for personal phone calls for a substantial period of time imperiling the citizens of Breaux Bridge in not being able to reach the Police Station.

There have also been encounters of physical violence between your husband and yourself while you were on duty at the Police Station, which demeans the office which you hold and causes the Police Department to be held in disrespect.

As a result of the accumulation of these actions, we are advising you that you are suspended beginning Wednesday November 26, 1988 for a period of two weeks and that it is our recommendation that it be without pay.

If the problems continue to occur, we will have no choice but to recommend firing.

*Appendix B*

Sincerely,

George Menard
Chief of Police

GM
cc: Honorable Mayor Louis Kern

## APPENDIX C — NOTES OF ATTORNEY

February 18, 1989:

At approximately 10:00 a.m., I was contacted regarding the arrest of Roger Istre on various charges of misconduct with juveniles, the previous day. I immediately met with Charlie at the P.D. The Chief was present. I was told that on the previous Tuesday night, Howard & Dave broke into Roger's desk to find pictures of juveniles that Roger had taken. Howard, using the P.D.'s camera, took pictures of the pictures. This photo was supplied to Ezebe, who attempted to contact Col Alexander. Apparently, Col was not approached until Thursday night.

Before going to Ezebe, Howard showed the picture to Pauline. Pauline has stated that she was told, by Howard, not to say anything, that he was going to use the picture to make politics at the next election. Pauline advised her husband, Eldridge, about the pictures, so that he could use the info in an effort to cut a deal with the D.A. regarding his own criminal charges. This is how the Sheriff got involved.

Col contacted one of the juveniles, to whom he is related, and was advised that the picture and incidents are correct. He then got a police officer to take a statement, and assumed the matter would be handled properly.

From another source in the S.O., I learned that Goodie and Derouselle were directly involved in one incident where a juvenile was held down and partially stripped while a picture was taken. I understood criminal charges were pending.

I have also been advised that Ezebe and Howard are sexually involved with a minor. There is no confirmation as the

*Appendix C*

S.O. states that the girl denies the claim. Apparently, there are no independent witnesses. We are also advised that several juveniles claim to have been picked up, and rode around with police officers until 2:30 or 3:00 in the morning.

I returned home and spoke with Uncle Jim, who had heard the Mayor was trying to contact me. I called the Mayor and tentatively set up a meeting with him and various councilmen for Sunday.

February 19, 1989:

I met with the Mayor and Uncle Jim where we discussed the problem and potential liability, which is substantial. The Mayor advised me of a meeting the following morning.

February 20, 1989:

The Mayor, Chief, Charlie and I met with the Sheriff and Butch Dupuis. The above facts were confirmed. I was provided copies of the pictures and the names of the children. A discussion concerning the police officer was conducted wherein the Chief took the following actions:

Suspended indefinitely because of the pending criminal charges:

Melvin Goodie
Anthony Derouselle.

Suspended for two weeks, because of knowledge of illegal

*Appendix C*

actions, but failed to advised Chief or other law enforcement authorities:

Ezebe Chevalier
Howard Devillier — ALL WITHOUT PAY
Dave Clark (1 week)

Suspended indefinitely with a reccomendatin of discharge, because of previous suspension and probation; for similar offense:

Pauline Menard.

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I wrote the letters informing the officers

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These actions were taken upon the recommendation of the Sheriff, the Mayor and myself, based upon information in our possession.

The Sheriff agreed to cooperate fully to provide the City with information and furnish reserve deputies.

Since the suspension, a story has arisen where Ezebe, Howard were to meet with the Chief at 4:00 p.m on the Friday of the arrest. (Note that Roger was arrested at 3:00 p.m). However, the S.O. has learned that Ezebe left town at 2:00 p.m to go to the races and did not return until after 11:00 p.m. In addition, both officers picked up their checks that day without mentioning anything to the Chief.

There have been numerous conferences with S.O. detectives regarding the various charges. There has been little

change, other than Melvin confessing.

On February 27, 1989, the Mayor, Chief Col Alexander and myself met with the Sheriff and Phil Haney. Possible settlement was discussed. Col was to set up appointments for me to get an idea what it would take to settle. Meetings were set up for Tuesday at 10:00 am and 2:00 pm., and on Wednesday. So far, the first meetings were no show.

Also, I was advised today that Kyle Gideon had filed suit on behalf of Dirk Angelle. It is a 1983 action in Federal Court and makes defendants Roger, George Menard, and the City. I will be served shortly. This matter will be defeused.

Regarding the various juveniles, only one of the incidents is really troublesome, that of the child held down and photographed. The rest appear to be willing participants. There is a claim of a homosexual relationship which may also be a problem; however, the D.A. may not even accept charges here. In any event, the potential exposure to the City may exceed the ability to pay. Appropriate steps may have to be taken to seek protection.

I have also learned that, at least on one occasion, Roger, acting alone, forced two females to disrobe, while they were detained for an offense which would not require search.

Based upon the foregoing, I would make the following recommendations:

The Chief's action be approved with regard to Howard, Ezebe and Dave, with the additional consideration that they be placed on lengthy probation.

*Appendix C*

Affirmation as to Pauline Menard.

Discharge Melvin Goodie.

Anthony Derouselle be maintained on indefinite suspension without pay, until the Sheriff's investigation is complete, with an evaluation at the conclusion as to retain or not. This is an alternative to discharge.

I also recommend that the following procedures be adopted:

a) The hiring procedure be altered to include background & educational checks. There be a mandatory interview with the members of the council. Psychological evaluation be obtained if financially possible. Tests.

b) There be regular meetings, attended by the Mayor, and/or council, wherein complaints could be discussed regarding performance.

c) Strict security measures be taken to prevent unauthorized persons from entering the P.D. office.

d) Prohibit passengers, other than prisoners, in police vehicles.

e) A policy should be established regarding the chain of command, and information outside the police department.

f) Ask the Sheriff if each officer could participate in a continued training program.

*Appendix C*

g) Juveniles should not be questioned or used as informants without the presence of another officer or the parents, preferably both. Any such contact should be in the police station.

h) Any time female prisoners are present, a female officer should also be and conduct any searches.

While these suggestions do little to change the present problem, I feel this will assist in preventing problems in the future, especially in light of today's environment where everyone is anxious to sue.

I would also suggest that litigation is pending regarding this matter. Therefore, any contact with the victims or their families should be avoided. Statements to the press should also be avoided. Everyone should be careful of what is said regarding these matters because of the possibility of stating something not generally known. An unfortunate slip of the tongue may adversely affect pending litigation. I am not suggesting a coverup, and any appearance of such is to be avoided. I feel that everything regarding this unfortunate incident should be handled in the context of pending litigation.

Very little information has been provided to the media. Other than some clarification, very little should be. I would suggest that the emotions should die down.